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Restoring Faith in Natural Resource Policy-Making: Incorporating Direct Participation Through Alternative Dispute Resolution Processes

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Natural Resources Law Center

Occasional Papers Series

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Legal Counsel to the Governor
Washington State



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Law Center**

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RESTORING FAITH IN NATURAL RESOURCE POLICY-MAKING:
INCORPORATING DIRECT PARTICIPATION THROUGH
ALTERNATIVE DISPUTE RESOLUTION PROCESSES

by Kaleen Cottingham*

Although the means to manage and allocate natural resources have evolved over the years, the traditional forums for addressing policy conflicts have not kept pace with the rapidly changing societal values. It seems that what is missing is legislative or administrative policy leadership. This is often the reaction when a community is unable to act. But the best alternative is not tougher decision-making by elected or appointed officials. In fact, when frustrated officials try even harder to impose their wills, more intense versions of the same disputes are likely to erupt. This was clear in early efforts to adopt a new process for setting instream flows in Washington State. The laws of public policy-making tend to parallel the laws of physics: for every imposed action, there is an equal and opposite reaction.

The result is generally an impasse. As long as stalemates persist, important problems remain unresolved. What is needed is an alternative process that incorporates direct participation by affected parties and the public.

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An alternative is needed because there are problems with using the existing administrative process to resolve natural resource conflicts. Over the past two decades, many individuals have taken up the rallying cry of "get government off our backs." This is due in part to a diminished trust or faith that individuals have in administrative decision-making.

The remedy advanced by the administrative agencies, often through statutory directive, is to more thoroughly involve the public in the decision-making process through hearings or to make the decision in an "open" forum. At the end of the hearing, a decision is made by the authorized decision-maker. The decision offered to the parties may be a reasonable solution, but because the public does not understand or accept the process, they do not accept the decision. Without active participation it seems that the result is institutional gridlock caused by interest group vetoes. This gridlock effectively paralyzes government.

An alternative is needed because there are problems with using the legislative process to resolve natural resource conflicts. When interests become frustrated with the "bureaucracy," their first tendency is to turn to the legislative process to resolve the impasse. Perusal of any newspaper today reveals evidence of the public's growing frustration with politicians and the political process. A recent survey done for the Kettering Foundation found that the public is not apathetic, but does feel impotent when it comes to politics. Citizens still care, yet they feel "pushed out" of virtually every area of the political process. They feel cut off from political debate. They have lost faith in available means for expressing their views.

Certainly there is much to lament about politics today. Public participation in voting is low: just barely a majority (50.1 percent) of eligible voters cast a ballot for president in 1988; nationwide turnout for the 1990 election was a dismal 36 percent. The public believes that politics have evolved into a "system" made up of all-too-powerful special interests, lobbyists, and political action committees that act as the real power brokers in politics; that expensive and negative campaigns turn people away from the political process; that the media seems to promote controversy and sound bites over substance. Citizens argue that politics have been taken away from them. People are turned off from politics by the inaction that they perceive and because they believe that larger needs--public needs--are going unmet.

Citizens say they are losing their connection to their public officials--and thus to the political process. Citizens do not, however, believe that each and every public official is corrupt or misguided but, perhaps even more troubling, that there is a fundamental lack of trust and confidence in public officials as a group. The public views legislators as no longer governing, but rather as reacting to the pressures of special interests and other organized constituencies.

In the end, citizens believe that political discourse seems absent from politics and that they themselves are shut out of the political discussion that does take place. Or, as Saul Alinsky wrote in Reveille for Radicals (1946), "a democracy lacking in popular participation dies of paralysis."

In many states, citizens have resorted to using initiatives to get their issues before the general voters. As has been seen recently, the voters have not necessarily supported

these initiative measures, finding them technically complex and overwhelming. Recent examples include Washington's Growth Management Initiative and California's "Big Green." When in doubt, the public seems to vote "no." Turning an initiative into a law is one of the most difficult tasks in politics. According to an article in the Seattle Times (Nov. 11, 1991), voters nationally reject 75 percent of all initiatives. The negative side effect of initiative failure is that the very impetus for an initiative--lackluster legislating--gets reinforced by the negative showing at the polls. The threat of an initiative used to be enough to force legislative action but now, with the recent trend towards failure, this threat has vanished.

Finally, efforts have been made to increase voter interest. Reviving the political parties or increasing voter participation will only get at the surface of the political erosion. So, too, would efforts to reform campaign financing, enact new ethics codes, and limit the terms of legislative members. These "window dressings" are merely tinkering at the margins of politics when it is how politics are conducted that must be changed.

Reconnecting citizens and politics will not be an easy task. It is, however, essential because citizens believe that their government and its public officials have failed them and that the system can no longer produce solutions to the pressing problems. Enabling "participatory democracy" by way of alternative dispute resolution processes is a first step towards restoring faith in the process of governing.

An alternative is needed because there are problems with using litigation to resolve natural resource conflicts. When administrative and legislative efforts fail to resolve disputes, aggrieved parties go to court. Over the past twenty years, natural

resource policy implementation has frequently resulted in administrative breakdowns and judicial intervention. Laura Lake, in Environmental Mediation: The Search for Consensus(1980), indicates that these are two phenomenon which indicate significant institutional stress and adaptation.

The problem with litigation is not that decisions are not reached, but that those decisions are frequently appealed. The losing party often simply moves to another venue or adopts another tactic. The original suit is appealed to a higher court, or a new suit is filed on slightly different grounds. Legislation is sought which, if passed, effectively reverses the court's decision. The losers are spurred to continuing action by powerful incentives, including economic self-interest and the desire to save face. Enormous attorney effort has been expended in nearly all of the western states adjudicating water rights, many of which eventually arrive at the U.S. Supreme Court for resolution.

Some advocates of litigation as a political strategy say that litigation changes the balance of power by developing enforceable legal rights. This is true, for example, in the area of treaty-based water rights. Judicial power is, however, a weak form of power for statutory, non-constitutional issues since, at any time, legislators may bow to current public demands and rescind or limit judicial review of statutes or revise or repeal the underlying statutory requirements if the stakes are high enough.

Litigation, even when successful, can be less than satisfactory. Judges may change behavior, but they are far less likely to alter attitudes and do not have the authority to commit financial resources to implement their decrees. Judicial victories can be, therefore, short-lived or continuing work.

Finally, the use of "litmus tests" to ascertain the qualifications of judicial appointees may lead to the perception of political baggage in the courtroom. This will only exacerbate the lack of acceptance or ownership in the judicial outcome.

All this frustration and gridlock begs for an alternative process to resolve policy conflicts. For the past ten years interest has been growing in using alternative means to better involve the public and the various interests in natural resource decision-making. Many groups and interests seem to be finding degrees of success in addressing natural resource policy issues with various participatory processes---such as mediation or negotiation. Recent successes include: Washington's Water Agreement (Chelan Agreement); California's conservation program; Virginia's Instream Flow Roundtable; Hawaii's groundwater code Roundtable; and Arizona's groundwater act negotiations, to name a few.

These alternative processes shift the perspective of a dispute from negative opposition to more positive problem solving. Such a movement encourages a more creative view of the options available. Negotiation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. Mediation involves the use of a neutral third party to assist with the negotiation process. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The dispute is settled when the parties themselves reach what they consider to be a workable solution. Since compulsion is not involved in negotiation or mediation, agreement reached should reflect a belief by the parties that they are better off as a result than they would be by pursuing other

alternatives. In order for parties to be willing to participate in negotiation or mediation there must be a stalemate that is mutually frustrating.

These alternative processes are more likely to resolve a dispute than a vote of a legislative body, a decision by an administrative agency, or a court decree because it is more likely to meet more of the participants interests. If the parties themselves have voluntarily agreed to a decision, they should be more likely to be satisfied with it and more likely to implement it.

Using such alternative processes on natural resource issues is not simply a way of resolving resource conflicts; it is also a way of redefining the way people think about them. What these alternative processes involve is the details of change, and not the fact of change. Public policy formulation is dependent not only upon effective leadership, but upon the forging of coalitions. All that negotiation or mediation does is to assist in the forging of those coalitions.

The central quality of negotiation and mediation is the capacity to reorient the parties toward each other; not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another. Instead of creating the illusion of truth, these processes embrace the accommodation of competing interests. Moreover, negotiation and mediation force each side to acknowledge the legitimacy of claims of the opposition.

The use of these alternative processes over the past decade evidences the relative beginnings of what is going to be a long, deep and fundamental process of change in the

way the decisions are made. People want to participate in the process not simply as members of interest groups or through elected or appointed representatives, but as individuals...as citizens. It is in processes like these that public life is being and will be regenerated in this country. This kind of collaboration is part of what Daniel Kemmis has called the "next American frontier." (Community and the Politics of Place (1990)).

This kind of cooperative citizenship recaptures the very essence of democracy; it makes government far less a matter of bureaucracy, far more a matter of direct exercise of citizen competence. Negotiation and mediation seem to be designed to empower conflict resolution.

Not all issues, however, lend themselves to an alternative process. The use of negotiation or mediation is not a universal panacea. It will not fit every situation, every conflict, or every dispute. For some issues, there just does not appear to be any middle ground. There are certain circumstances when it is not recommended. It is probably undesirable if one party clearly has superior economic power, if the participation of one or more parties must be compelled, or if at least one of the parties wishes to establish a legal precedent or societal norm.

In closing, these alternative participatory processes change the way decisions are made. It will take time for their acceptance to catch on and it will take vigilance to assure that the "public" issues are properly addressed. Mark Twain captured the process of change best when he wrote in Puddenhead Wilson: "Habit is habit, and can not be flung out of the window by any man, but coaxed downstairs a step at a time."